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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF ARIZONA

7 United States of America,)
8 Plaintiff,) CR-11-2498-TUC-DCB
9 v.)
10 Marshall Edwin Home,) ORDER
11 Defendant.)
12 _____)

13 This matter was referred to the United States Magistrate Judge
14 pursuant to 28 U.S.C. §636(b)(1)(B) and the local rules of practice of
15 this Court for hearing and a Report and Recommendation (R&R) on the
16 Defendant's Motion to Dismiss Counts I through 3 in the Superseding
17 Indictment. Before the Court is the Magistrate Judge's Report and
18 Recommendation on the Defendant's Motion to Dismiss. The Magistrate Judge
19 recommends to the Court that the Motion to Dismiss should be denied. The
20 Defendant filed an Objection to this Recommendation and the Government
21 filed a Response.

22 **OBJECTIONS**

23 Defendant objects that the superceding indictment fails to allege
24 that the debtor United States Corporation actually exists, such that the
25 defense of legal impossibility is available to the Defendant. (Objection
26 at 5.) Further, that because as a matter of law United States
27 Corporation is a fiction, the charge of bankruptcy fraud is a legal
28 impossibility. (Objection at 8.) Finally, Defendant objects that the

1 superceding indictment creates a legal impossibility if United States
2 Corporation was in reality a government entity. (Objection at 10.)

3 STANDARD OF REVIEW

4 When objection is made to the findings and recommendation of a
5 magistrate judge, the district court must conduct a de novo review.
6 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

7 DISCUSSION

8 Defendant is charged with violations of 18 U.S.C. § 152(4) which
9 provides: a person who knowingly and fraudulently presents any false
10 claim for proof against the estate of a debtor, or uses any such claim
11 in any case under title 11, in a personal capacity or as or through an
12 agent, proxy, or attorney knowingly and fraudulently presents any false
13 claim for proof against the estate of a debtor, or uses any such claim
14 in any case under title 11, in a personal capacity or as or through an
15 agent, proxy, or attorney shall be fined under this title, imprisoned not
16 more than 5 years, or both.

17 The Report and Recommendation explains, as follows:

18 The charges against Defendant derive from a bankruptcy
19 case in which Defendant initiated a Chapter 11 involuntary
20 bankruptcy against an entity he identified as "U.S. Corp"
21 and its "agents and/or instrumentalities." (Doc. 185-1). In
22 the bankruptcy case, Defendant filed a number of proofs of
23 claim on behalf of more than 70 alleged creditors against
24 U.S. Corp. (Doc. 185-7). Defendant filed these claims and
25 other motions in the bankruptcy case as part of an effort
26 to avoid home foreclosures for the creditors. (See Doc. 185-
27 3). Within a month of Defendant initiating the bankruptcy
28 case, the bankruptcy court issued an order to show cause why
the court should not limit Defendant's filings. (Doc. 185-
5). After the show cause hearing, the bankruptcy court
entered a written order dismissing the case because U.S.
Corp. was not a person, defined as an "individual,
partnership, and corporation" and even if it was a
corporation, Defendant asserted it was the United States and
governmental units cannot be involuntary debtors, except in
limited circumstances not applicable. (Doc. 185-7). An

1 indictment must be a "plain, concise, and definite written
2 statement of the essential facts constituting the offense
3 charged . . ." Fed.R.Crim.Proc. 7(c)(1). An indictment,
4 sufficient on its face, cannot be challenged by arguing the
5 allegations are not supported by adequate evidence. *United*
6 *States v. Jensen*, 93 F.3d 667, 669 (9th Cir.1996) (internal
7 citations and quotation omitted). The question before the
8 Court is whether the Superseding Indictment sufficiently
9 charges crimes against Defendant in Counts 1 through 3 when
10 the debtor is identified as U.S. Corp. - an entity that is
11 not real. "Legal impossibility exists when the intended acts
12 would not constitute a crime under the applicable law.
13 Factual impossibility refers to those situations in which,
14 unknown to the defendant, the consummation of the intended
15 criminal act is physically impossible." *United States v.*
16 *McCormick*, 72 F.3d 1404, 1408 (9th Cir.1995).

17 (R&R at 2-3.)

18 Here, the Government alleges,

19 [T]he defendant filed an involuntary petition in bankruptcy
20 against "U.S. Corp," which a reasonable jury could conclude
21 was the United States. Second, the petition caused a
22 bankruptcy case to be initiated (# 04:11-06731.) Thus, while
23 that case was pending, "U.S. Corp" was a debtor in the
24 bankruptcy court. Third, while that petition was pending,
25 defendant filed false proofs of claims against the estate
26 of the debtor in the bankruptcy case. These filings of the
false claim are the crime delineated by § 152(4). Section
152(4) does not require proof of a loss; it is essentially
a false statement charge. Thus, the fact that the bankruptcy
case was ultimately dismissed and did not succeed, or even
could not succeed, is irrelevant to whether § 152(4) was
violated.

19 The defendant's reliance on the definition of "debtor" in
20 Title 11, the Bankruptcy Code, is misplaced. The criminal
21 statute at issue in this case, 18 U.S.C. § 152, has its own
22 definition of "debtor," contained in 18 U.S.C. § 151. As
23 previously stated, for purpose of the criminal statute, a
24 "debtor" is defined simply as "a debtor concerning whom a
25 petition has been filed under Title 11." 18 U.S.C. § 151.
26 This definition does not included the word person, so *United*
States v. Havelock, 664 F.3d 1284 (9th Cir. 2012) is not
applicable to this caseThe defendant filed a petition
against "U.S. Corp." It will be for the jury to decide
whether in the defendant's mind, "U.S. Corp." was the United
States government. As the Magistrate Judge noted, a pretrial
motion to dismiss cannot challenge the sufficiency of the
evidence.

27 (Doc. 211 at 6-7.)

1 After a de novo review of the record, the Court agrees with the
2 Report and Recommendation, as follows:

3 In the case before this Court, Defendant is charged with
4 "knowingly and fraudulently" making false claims against a
5 debtor. A jury could reasonably infer that Defendant
6 knowingly and fraudulently made the false claims against a
7 debtor because Defendant believed U.S. Corp. was a real
entity and therefore it could be a debtor. This issue
remains for the jury to determine. A motion to dismiss
"cannot be used as a device for a summary trial of the
evidence." *Jensen*, 93 F.3d at 669.

8 (R&R at 4.) In sum, the Defendant "should be treated in accordance with
9 the facts as he supposed them to be." *United States v. Quijada*, 588 F.2d
10 1253, 1255 (9th Cir. 1978). Since *Quijada*, the Ninth Circuit has held
11 that impossibility is not a defense to various charges. "Proof of what
12 a defendant supposed the facts to be[...]must be established beyond a
13 reasonable doubt" in a trial to a jury, not in a motion to dismiss the
14 indictment. *Id.*

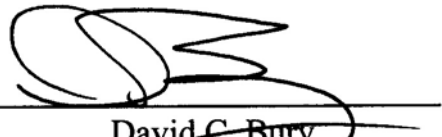
15 CONCLUSION

16 Accordingly, after conducting a de novo review of the record,

17 **IT IS ORDERED** that the Court **ADOPTS** the Report and Recommendation
18 (Doc. 199) in its entirety. The Objections (Doc. 205) raised by the
19 Defendant are **OVERRULED**.

20 **IT IS FURTHER ORDERED** that Defendant's Motion To Dismiss Counts I -
21 3 of the Superceding Indictment (Doc. 184, 185) is **DENIED**.

22 DATED this 8th day of February, 2013.

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25 
26 David C. Bury
United States District Judge
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